84-938

No. _____

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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT A. BUSS,

Petitioner,

vs.

WESTERN AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Vol. I of III

QUESTIONS PRESENTED

1. Whether the F.R.Civ.P., Rule 41(b) dismissal of a civil action before trial, for petitioner-plaintiff's inability to lodge with the trial court a joint proposed pretrial order, stipulated to by the defendant prior to the pretrial conference heraing, constitutes the denial of access to the courts, the right to a trial on the merits, and to one's day in Court, and is a dismissal based on an unreasonable prior restraint on access to the courts in violations of Due Process of Law, under the Fifth Amendment, United States Constitution.

2. Whether the petitioner is entitled to proceed with a pretrial conference and to a trial on the merits, without respondent's consent, after lodging two extensive orders unilaterally, when defendant-respondent failed to supply its portion for the first and objected to procedural rights

reservations by petitioner in the second proposed draft. (See App. 71.)

3. Whether the trial judge is required to conduct a pretrial conference based on plaintiff's proposed orders containing his positions and thereafter issue a pretrial order pursuant to F.R.Civ.P., Rule 16 and try the case pursuant to same, and whether the district judge's failure to do so constitutes a per se, harmful, prejudicial denial of Due Process of Law under the Fifth Amendment, United States Constitution and is contrary to F.R.Civ.P., Rule 16.

4. Whether United States District Court for the Central District of California, Local Rule 9(g) (Civil), in effect in 1980 at the time of the dismissal of this action, providing "Not later than 5:00 p.m. on the Wednesday prior to the pre-trial conference, plaintiff shall serve and lodge with the clerk a proposed Pre-Trial Conference Order,

approved as to form and substance by the attorneys for all parties appearing in the case. . .," is in this action a violation of Due Process of Law, and is contrary to F.R.Civ.P., Rule 16 providing that "the Court shall make an order which recites the action taken at the conference" requiring the trial judge to prepare an order based on what transpires at the pretrial conference. (Emphasis added.)

5. Whether U.S. District Court for Central District of California Local Rule 9(g) circumvented the obligations of a trial judge to conduct a pretrial conference and make a pretrial order at its conclusion pursuant to F.R.Civ.P., Rule 16.

6. Whether the Ninth Circuit decision in Buss v. Western Airlines, Inc., USCA 80-5818, approving the dismissal of a civil suit rather than proceeding to trial on petitioner's proposed pretrial conference

order is in conflict with the decisions of the Third Circuit in Titus v. Mercedes Benz of North America, 695 F.2d 746 (1982), the Fourth Circuit in McCargo v. Hendrick, 545 F.2d 393 (1976), and the Seventh Circuit in J. F. Edwards Construction Co. v. Anderson Safeway, 542 F.2d 1318 (1976), holding that a trial judge's order and a local rule requiring a plaintiff to assimilate the opposition's positions in a pretrial proposed order exceeded the District Court's jurisdiction under F.R.Civ.P., Rule 16.

7. Whether the pretrial dismissal pursuant to F.R.Civ.P., Rule 41(b), for the district judge's apparent dissatisfaction with petitioner's unilateral proposed pretrial order, without the trial judge in any way giving petitioner notice of what he considered deficient about same is contrary to F.R.Civ.P., Rule 16 and places

the Ninth Circuit in conflict with the Second Circuit in Padovani v. Bruchhausen, 293 F.2d 546 (1961), by permitting a dismissal for entirely unspecified deficiencies in petitioner's proposed pretrial conference order, without giving petitioner any notice or reasonable opportunity to comply with Court objections and instructions. (App. 71.)

8. Whether petitioner Buss was entitled to preserve court-ordered pretrial proceedings out-of-court by tape-recording or shorthand reporter, concerning which he was subjected to being sanctioned for alleged misconduct, pursuant to Title 28, U.S.C., Section 753 in order to file an independent certified record of what occurred in the pretrial process, for the trial and appellate courts to hear and consider.

Whether the trial judge exceeded his jurisdiction in issuing orders that

"Tape recording or other reproduction of meetings between counsel shall not be permitted;" filed July 3, 1980 (Doc. App. F,23) in regard to pretrial meetings and exchanges, and said order was plain error, and harmful, material, prejudicial denial of due process of law as guaranteed by the Fifth Amendment, United States Constitution and contrary to Title 28 U.S.C., Section 753.

9. Whether the district court's failure to enforce petitioner Buss's right to discovery of admissible evidence of damages and policy, pattern and practice information concerning age discrimination constitutes an unreasonable prior restraint on one's right to his day in court and to have access to the courts to have a trial on the merits with all evidence available to be heard, and this constitutes a denial of Due Process of Law under the Fifth Amendment, United States Constitution. (Hickman

v. Taylor, 329 U.S. 495, 516 91 L.Ed. 451, 465 (1947); Green v. McDonnell-Douglas, 411 U.S. 792, 804-805, 36 L.Ed.2d 668, 679, 93 S.Ct. 1817 and Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824.

10. Whether petitioner is entitled to obtain binding F.R.Civ.P., Rule 37 adjudications for defense failure to supply discovery, and he was denied access to these discovery remedies by virtue of non-consentual U.S. Magistrate referrals in violation of Article III, United States Constitution and the Fifth Amendment, United States Constitution. (Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 L.Ed.2d 598, 102 S.Ct. 2858.)

11. Whether solely an Article III District Court judge, not a U.S. Magistrate, has jurisdiction to issue F.R.Civ.P., Rule 37 sanctions of contempt, default and default judgments, adverse finding of fact,

partial summary judgment or adjudications, and to prevent the trial of a defense.

12. Whether the District Court Judges exceed their jurisdiction in delegating pretrial discovery, non-consentually, to a non-Article III U.S. Magistrate, and failing to hear same de novo.

13. Whether the non-consentual U.S. Magistrate referral of pretrial discovery matters in a civil case on evidentiary issues of what is relevant, privileged and admissible at the trial results in a constitutionally impermissible bifurcation of the trial issues concerning evidence which harmfully and prejudicially violate Article III, United States Constitution and the Due Process Clause of the Fifth Amendment, United States Constitution.

14. Whether a judgment of dismissal, wholly devoid of any findings of fact, and without any factual basis in the record,

jurisdictionally fails to provide a basis for an appellate court to evaluate whether the dismissal is fair, and the appellate court harmfully and prejudicially erred in failing to remand the matter for trial and proper factual findings that it could review (in violation of Due Process of Law, Fifth Amendment, U.S. Constitution). (Kelley v. Everglades Drainage District, 319 U.S. 415, 87 L.Ed. 1485.)

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No.

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

ROBERT A. BUSS,

Petitioner,

vs.

WESTERN AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Comes now the petitioner, plaintiff and appellant Robert A. Buss and petitions this Honorable Court for a writ of certiorari, directed to the Honorable Terry J. Hatter, United States District Judge for the Central District of California, the

United States District Court for the Central District of California, and the United States Court of Appeals for the Ninth Circuit, (reversing a pretrial judgment of F.R.Civ.P., Rule 41(b) dismissal as a harmful, per se violation of due process of law as guaranteed by the Fifth Amendment, U.S. Constitution), and remanding the above matter for a jury trial on the merits of the action.

The trial judge refused to proceed with either of petitioner's two, extensive, unilateral proposed pretrial conference orders, demanding a joint one, stipulated to by the defendant, as a prerequisite to a trial on the merits.

When petitioner's inability to supply a joint, stipulated proposed pretrial conference order consented to by defendant continued, the trial judge dismissed the above matter, unnoticed at a status conference

pursuant to F.R.Civ.P., Rule 41(b), five weeks before a rescheduled pretrial confeeence hearing was set for hearing and about four weeks before a further draft was due, without competent evidence, and without permitting plaintiff's counsel to even present any oral response and without the court giving any instructions or orders as to how he wanted a pretrial conference order prepared so that plaintiff would know how to come into compliance.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28, U.S.C., Sections 1255 and 2101(c) and Rules of the Supreme Court of the United States, Rules 17 and 20; Article III, United States Constitution and the Fifth, Sixth and Seventh Amendments, U.S. Constitution.

A copy of the opinion as issued by the United States Court of Appeals for the Ninth Circuit, filed on July 26, 1984, is attached hereto at Appendix "V".

A copy of the order denying petitioner Buss's petition for rehearing in the U.S. Court of Appeals for the Ninth Circuit, filed on September 13, 1984, is attached hereto at Appendix "W".

A copy of the order of dismissal by the trial in United States District Court for the Central District of California, the Honorable Terry J. Hatter, U.S. District Judge Presiding, entered October 2, 1980, is attached hereto at Appendix "R".

A copy of the denial of reconsideration of the order of dismissal by the trial court, entered October 23, 1980, is attached hereto and incorporated herein at Appendix "T".

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES AND REGULATIONS INVOLVED

Article III, United States Constitution; Fifth, Sixth and Seventh Amendments, U.S. Constitution.

Title 28, U.S.C., Sections 636, 753, 1291; Title 29 U.S.C., Sections 621 et seq. through Section 632, constituting the Age Discrimination in Employment Act.

Federal Rules of Civil Procedure, Rules 16, 37, 41(b) and 83.

Local Civil Rules for the United States District Court for the Central District of California, Rule 9(g) as in effect during 1980, Rule 9 as amended during 1983 and presently in effect, current Local Rule 27.

Article III, Fifth and Seventh Amendments, U.S. Constitution; Federal Rules of Civil Procedure, Rules 16, 14(b) in pertinent

part, and 83; U.S. District Court for Central District of California, Local Rules 9(g) in effect during 1980, and Local Rules 9.8 and 27 presently in effect, are set forth in Appendices "X" through "FF," pages 325 through 334.

STATEMENT OF FACTS

Petitioner Robert A. Buss commenced an Age Discrimination in Employment action against the respondent Western Airlines, Inc., pursuant to Title 29 U.S.C., Section 621, et seq. on January 12, 1977, in the U.S. District Court for the Central District of California, entitled Robert A. Buss v. Western Airlines, Inc., U.S.D.C.(C.D.Cal.) CV-77-0124-LEW.

Petitioner Buss had been a Western Airlines executive, employed by the respondent for 35 years. He was Director, Ground

Flight Training for five years before his termination at the age of 62.

The action was first assigned to U.S. District Judge Laughlin E. Waters and then transferred to the U.S. District Judge Terry J. Hatter, Jr.

After an explosive, bitter discovery and pretrial battle between petitioner Buss and the respondent Western Airlines, Inc., the action was dismissed before trial on September 22, 1980, without prejudice at a status conference. It was dismissed on an oral application without notice and without any defense declarations under oath, after any applicable statute of limitations had expired, pursuant to F.R. Civ.P., Rule 41(b), when petitioner could not supply a joint, stipulated pretrial proposed order, co-signed by respondent's counsel.

The Court's stated grounds were that "plaintiff has failed to comply with the orders of this Court previously made; plaintiff has failed to diligently prosecute this action and has not contacted opposing counsel regarding the preparation of a proper Pre-trial Conference order since the previous hearing on August 11, 1980." (Doc. 353; App. 221.)

The dismissal ground of no "proper" Pre-trial conference order appears to refer to U.S. District Court Local Rule 9 requirement that it be a joint, stipulated document executed by all parties, which stipulation the respondent had refused to execute.

However, neither Judge Terry Hatter's dismissal order (Docket No. 353; App. 221) nor the Ninth Circuit appellate opinion contain a finding or statement of facts from which this Court could evaluate the fairness or erroneousness of the dismissal

order. (App. Q, p. 319.)

Petitioner had lodged two proposed pretrial orders prior to the first scheduled pretrial conference set for August 11, 1980. One contained petitioner Buss's position only, because the respondent had delivered nothing to insert into it. (Doc. 345.) The second one contained those segments sent by respondent's counsel. (Doc. 346; App. 71.) But defense counsel objected to petitioner's reservation of rights to continue discovery in light of respondent's failure to supply same, and he refused to co-sign the second one. (See affidavit of attorney Giannini, filed August 11, 1980, Docket No. 347; App. M, p. 174.)

U.S. District Judge Hatter did not express <u>any</u> criticism of the unilateral proposed pretrial conference order drafts, except that they were not stipulated to by the respondent Western Airlines. (See

transcripts of August 11, 1980 hearing, App. L., p. 160 and September 22, 1980, App. P, p. 191.)

The dismissal occurred despite the facts that no prior sanctions of any kind were issued against petitioner other than that petitioner Buss's counsel had taped a pretrial meeting. (Order, filed July 3, 1980; App. F, p. 24.) Petitioner timely appeared at all court proceedings and timely filed all papers both in the discovery and pretrial process.

Starting on August 4, 1980, Judge Hatter threatened to dismiss the action although he admitted he did not know what was interferring with the flow of the pretrial process, (see App. 41.) despite the fact that Judge Hatter admitted he had not listened to the tape of the June 18, 1980 meeting he had detained from June 30, 1980 through August 11, 1980. (App. U, p. 318;

App. G, p. 27.)

Petitioner Buss had initiated aggressive discovery of the liability and damages information he required in order to obtain a full, fair trial on the merits when the case could not be settled.

As with most employee-employer disputes, both the liability and damages phase evidence and information needed were for the most part solely controlled by and in the possession of the respondent Western Airlines, Inc. The petitioner Buss had virtually no other source from which to obtain the evidence needed to establish his case, but the respondent Western Airlines, Inc.

Petitioner Buss faced an unending barrage of defense initiated interferences with his obtaining the information and evidence he needed to try his case.

District Judge Waters characterized respondent Western Airlines' defense posture

as being like the Russians at Stalingrad, and on March 23, 1979 during a hearing, he described Western Airlines' refusals to supply discovery as follows:

> " . . . there has been a determined resistance on the part of the defendant in this case to produce nothing, to say nothing.
>
> "I think there has been a deliberate lack of cooperation and an attempt to frustrate this discovery procedure in this case by the defendant."
> (R.T. P. 20, line 21 - p. 21, line 1.)

Judge Waters went on in the same hearing on March 23, 1979 to call the respondent's patter of conduct "a deliberate and determined, intentional pattern of frustration of the discovery process." (R.T. p. 21, lines 3-5.)

U.S. District Court Judge Waters had referred the Buss case to a U.S. Magistrate with a specific prohibition on petitioner Buss being able to seek a District

Court adjudications on discovery matters that had been made by the U.S. Magistrate on July 24, 1978. (App. B, p. 5)

This U.S. Magistrate referral was non-consentual and pursuant to a general U.S. District court order of the Chief Judge that no U.S. Magistrate referral could be appealed or heard and considered by a U.S. District Judge. (See general order, dated January 31, 1978, in App. A, p. 1.)

This non-consentual U.S. Magistrate referral, contained the proviso that no review, hearing or determination could be obtained from an Article III, U.S. District Judge, and thus suspended petitioner's right to seek appellate review of any U.S. Magistrate determinations. (App. A, p. 3.)

At the time of the Buss U.S. Magistrate referral, the U.S. Court of Appeals for the N nth Circuit, in which the Central District of California is located, had

issued an opinion in U.S. v. Ritte, 558 F.2d 926 (1977) holding that Magistrate orders were not appealable or reviewable on appeal, and only U.S. District Court orders were.

Also, the U.S. Magistrate referral on June 12, 1978 and July 24, 1978 (App. B, p. 5) for all further discovery proceedings resulted in the extremely harmful and deletorious destruction of significant remedies petitioner Buss had to obtain discovery pursuant to F.R.Civ.P., Rules 26-37 and Hickman v. Taylor, 329 U.S. 451. It ipso facto prohibited petitioner Buss from seeking final adjudicatory remedies contained in F.R.Civ.P., Rule 37, because a U.S. Magistrate, not being an Article III federal judge, had no jurisdiction to enter final adjudications.

These F.R.Civ.P., Rule 37 discovery enforcement remedies petitioner Buss lost by the non-consentual U.S. Magistrate referral included contempt, financial sanctions against non-parties, the entry of a default and default judgment, adverse findings of fact and orders that the sanctioned party not be able to produce evidence of a defense. See F.R.Civ.P., Rule 37(b).

Between June 12, 1978 and July 24, 1978, when the anti-appeal, no final adjudicatory discovery remedies orders of Judge Waters were issued and about May 19, 1980, petitioner was entirely unable to obtain Article III district court, judicial discovery determinations.

Petitioner Buss applied to the U.S. Court of Appeals for the Ninth Circuit for

a writ of mandate and/or prohibition filed on or about September 29, 1978, to vacate the magistrate referral as violative of Article III and the Due Process Clause of the Fifth Amendment, United States Constitution. Two Ninth Circuit orders were filed and issued to the respondent District Court Judge in response to the writ, but they went unanswered. When the no review provisions were vacated, the writ was denied.

Twice after the non-appealability provisions were lifted, applications were made to Judge Waters, who remanded them to the U.S. Magistrate rather than entering substantive orders both times. (See Doc. 250, 270 and 271; App. E, p. 20.)

Petitioner had significant discovery production problems which required that he have the force and strength of F.R.Civ.P.,

Rule 37(b) remedies and the ability to seek appellate review of those areas of discovery not enforced.

These included his inability to obtain sufficient damages data to do an economic evaluation for trial which was ordered, but unenforced by the U.S. Magistrate, and the failure of the trial court to issue orders or for the defendant to voluntarily supply sufficient information to do a pattern and practice workup pursuant to McDonnell-Douglas v. Green, 411 U.S. 792, 36 L.Ed. 2d 688.

In petitioner's notice of taking a F.R.Civ.P., Rule 30(b)(6) Western Airlines representative's deposition, filed July 18, 1978 (Doc. 80, p. 3) petitioner Buss scheduled the obtaining of loss of earnings damages discover as follows:

> "8. What the salaries of all corporate officers, directors, executive personnel have been

during the years of 1974, 1975, 1976, 1977, 1978, as well as bonuses, benefits, pension plans, insurance agreements for those with Western Airlines, Inc., in said capacities."

In his August 17, 1978 discovery order, the U.S. Magistrate ordered that the earnings information on petitioner's successors be supplied by the respondent Western Airlines, Inc., as follows:

"(2) Defendant's motion to limit the persons to be produced and the scope of the depositions to be conducted pursuant to plaintiff's notice of taking depositions dated July 14 (sic), 1978 is:

* * * * * *

"(g) Granted as to paragraph 8, except defendant is to produce the information requested in writing as to the person or persons who replaced Mr. Buss after he was placed on furlough, including their seniority;" (Doc. 120, p. 2, lines 17-20.)

The respondent gave such entirely incomplete information as a consequence of the August 17, 1978 orders for damages

discovery and refused to complete it that petitioner could not obtain a meaningful economic evaluation as his economist stated. (App. O, 179.) Petitioner had to go back to court repeatedly attempting to get enough information to do his economic evaluation of damages but he never succeeded in enforcing his right to this essential discovery. (App. D, p. 10; App. O, pp. 179, 190.)

Petitioner made several applications attempting to obtain orders for sanctions for non-production of sufficient damages information. (App. D, p. 10; App. K, pp. 91-95, 105, 106, 127, 135.)

The only recourses petitioner had as a result of the failure of the District Court to enforce this damages discover were to have his economic expert attend the trial of the case and testify based on the testimony at trial and to seek appellate

review. The situation meant that petitioner's hands were tied by the respondent's failure to give damages discovery which necessarily could not be inserted in a proposed pretrial document.

In order to establish the necessary element of "intent" and to establish wilfulness for the purposes of double damages in Age Discrimination in Employment suits, under 29 U.S.C., Section 626, petitioner found it to be necessary to his case to obtain a pattern and practice workup. The U.S. Magistrate at first did not order any information and then after a hearing on June 25, 1979 in which Judge Waters ordered for augmentary information.

Petitioner Buss's applications for reconsideration of the U.S. Magistrate's discovery orders and final adjudicatory determinations had been filed on May 25, 1979 (Doc. 215), June 29, 1979 (Doc. 219)

and on July 10, 1979 (Doc. 225), and the pre-hearing stipulations filed on August 15, 1979. (Doc. 242)

The respondent Western Airlines produced computer printouts which in their photocopied form were blurred, illegible and entirely too incomplete to be used for an age discrimination pattern and practice workup. Finally, counsel admitted at the June 25, 1979 hearing before Judge Waters that the materials containing the information for the pattern and practice workup were not computerized and had to be hand-processed.

But in a December 17, 1979 hearing before Judge Waters, petitioner repeated attempts to enforce discovery, and the following exchange occurred between the Judge and counsel concerning the August 15, 1979 discovery pre-hearing stipulation

of issues:

> "THE COURT: . . . I am going to refer that back to the Magistrate with the requirement that the 306 be placed in proper form.
>
> I am going to order the Magistrate to rule on only one subject at a time, and then as soon as he has ruled, then that matter is to be immediately referred to me. . .
>
> MS. LAVINE: Very well.
>
> Your Honor, I at this time move that you rule on those matters which cannot be heard by a Magistrate, and that your motion for reconsideration be granted or denied.
>
> THE COURT: All other matters are referred back to the Magistrate.
>
> MS. LAVINE: You decline to rule on the motions for reconsideration?
>
> THE COURT: You've got my order."

When Judge Hatter across the board denied all of petitioner Buss's discovery applications which included his applications for pattern and practice workup information, damages information and the

home locations of witnesses, petitioner applied to the U.S. Court of Appeals for the Ninth Circuit for a writ of prohibition and/or mandate to enforce the discovery in Buss v. Western Airlines, Inc., U.S.C.A. 80-7287, which was denied without opinion, on June 16, 1980.

Throughout the proceedings, and particularly in regard to the pretrial process, petitioner timely appeared at all of the scheduled proceedings in court, and timely filed all of the required pretrial documents. They included a witness and exhibit list, due 40 days before the pretrial, although the respondent Western Airlines entirely failed to file one at all (Doc. 307, filed May 14, 1980), a memorandum of contentions of law and fact (Doc. 340) and two proposed drafts of pretrial conference orders (Doc. 345, filed August 5, 1980 and Doc. 346, filed August 7, 1980).

Respondent's counsel engaged petitioner's counsel in bitter personal attacks during the spring and summer of 1980, forcing her to process and appeal to protect herself professionally and which was inordinately time consuming. This involved petitioner's counsel having taped the pretrial hearings. (App. F, p. 23)

Petitioner was unable to obtain drafts of the proposed pretrial order, co-signed by respondent's counsel, which local rules required to be prepared jointly prior to the pretrial conference rather than afterwards or based on the trial judge's orders as to what was to be put into same.

The second draft of the proposed pretrial conference order (Doc. 346) is attached hereto at App. K, p. 71) and the affidavit of defense counsel Paul L. Giannini, filed August 11, 1980 stating that he objected to the reservation of discovery rights of

petitioner as his sole reason for not co-signing the document in order to make it a "proper" proposed pretrial conference order. (See dismissal order, entered October 3, 1980, App. R, p. 221).

Petitioner Buss's counsel Joan Lavine tape-recorded a June 18, 1980 pre-trial conference meeting and attempted to preserve others. She had done so pursuant U.S. Magistrate orders, filed August 17, 1978 (Doc. 120, pp. 2-3).

On June 30, 1980, Judge Hatter issued a conditional sanction order for Ms. Lavine having taped a court-ordered pretrial meeting on June 18, 1980 despite the U.S. Magistrate's order (Doc. 120), requiring that the tape be deposited with him by the next day, which petitioner's counsel did on June 30, 1980. (See receipt, Doc. 336, filed July 22, 1980; App. G, p. 27)

Judge Hatter personally detained the tape of the June 18, 1980 pretrial meeting until August 11, 1980, the date of the pretrial, so that it could not be used by the petitioner to transcribe respondent's position for the proposed document or be used to establish what the respondent had agreed to have put in the proposed pretrial order. (App. G, p. 27.)

Also, Judge Hatter issued an order, filed July 3, 1980, entirely preventing the use of exchanges at any pretrial meetings. It stated in part:

> "Tape recording or other reproduction of meetings between counsel shall not be permitted." (Doc. 327; App. R, p. 23.)

Petitioner's counsel had no means of preparing pretrial documents that were required to be based on exchanges taking place at court ordered meetings, as a result of the above order.

Petitioner Buss once again petitioned the U.S. Court of Appeals for the Ninth Circuit for a writ of prohibition and/or mandate to permit him to tape or otherwise be able to take down through a shorthand reporter or stenographer the pretrial proceedings in Buss v. Western Airlines, Inc., U.S.C.A. 80-7364. That application was denied. (App. H, p. 29.)

At an August 4, 1970 hearing before Judge Hatter, Judge Hatter stated that he did not know why the pretrial process had not been completed, but that he would dismiss the action if it were not, in denying defense counsel's application for a continuance. (See App. J, p. 41.)

Respondent's counsel specified that his inability to work on the Buss pretrial drafting was due to his being court-ordered by Judge Hatter to attend proceedings during the week of August 4, 1980 in another

discrimination action before Judge Hatter, EEOC v. Western Airlines. (Doc. 347, p. 2; App. M, p. 175; transcript of August 4, 1980 hearing, attached at App. J, p. 41.)

At the August 11, 1980 hearing the trial judge continued the pretrial conference to October 27, 1980, with a status conference, scheduled for September 22, 1980. (Minute order, August 11, 1980, Doc. 352; App. N, p. 178a.) It stated in part:

> "Pltf to be ready for PTC on 10/27 or action will be dismissed unless good cause is shown."

At the status conference on September 22, 1980, Judge Hatter dismissed the case without giving petitioner any opportunity at all to respond to defense counsel's claim that no work was being done on the case. (September 22, 1980 transcript; App. P, p. 191.) Defense counsel's claim was false. (Doc. p. 353, 361.)

U.S. Court of Appeals for the Ninth Circuit affirmed petitioner's appeal on July 26, 1984. The Ninth Circuit did not address petitioner's right to discovery, to present triable issues for adjudication without undue coersion in the pretrial process, the non-consentual discovery referral to a U.S. Magistrate and Article III violations or the lack of findings in the dismissal order, omitting an appellate statement of facts.

ARGUMENT

I

THE TRIAL COURT'S F.R.CIV.P., RULE 41(b) DISMISSAL OF THE BUSS MATTER, ON AN ORAL, UNNOTICED APPLICATION, WITHOUT EVIDENCE, DUE TO PETITIONER"S INABILITY TO OBTAIN FROM RESPONDENT A JOINT, STIPULATED, PROPOSED PRETRIAL CONFERENCE ORDER TO LODGE PRIOR TO A PRETRIAL CONFERENCE, CONSTITUTES THE DENIAL OF ANY MEANINGFUL, EQUAL ACCESS TO THE COURTS IN VIOLATION OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT, U.S. CONSTITUTION, AND EXCEEDS THE TRIAL JUDGE'S JURISDICTION UNDER F.R. CIV.P., RULE 16.

Your petitioner Robert A. Buss has suffered the outrage of an unreasonable, arbitrary dismissal of his action, without trial, as a direct and immediate result of

respondent's failure to cooperate in finishing and executing a proposed, joint, pretrial conference order when petitioner insisted on pursuing damages and pattern and practice discovery. (App. K, p. 71, App. M, 174)

Petitioner Buss has been punished for respondent's wrong-doing that resulted in petitioner's inability to supply his opposition's signature and position to present in a proposed joint document for refusing to make damages and pattern and practice discovery. (Societe Internationale v. Rogers, 357 U.S. 197, 2 L.Ed.2d 1255, 78 S.C.t. 1087).

United States District Court for the Central District of California, Local Rule (Civil) 9(g) requiring a joint, stupulated pretrial conference statement to be filed prior to a pretrial conference hearing impermissibly placed in the hands of the opposition the arbitrary power to withhold

consent for a trial. Such a rule has no legal basis in F.R.Civ.P., Rule 16 and is an impermissible, prior, arbitrary restraint on a party's right to trial in violation of Due Process of Law, Fifth Amendment, United States Constitution. (Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780.)

In the face of disputes over the proposed pretrial order, petitioner Buss was entitled to have those disputes over damages and pattern and practice issues adjudicated by the district judge in F.R. Civ.P., Rule 16 proceedings. It was the responsibility of the trial judge to dictate the pretrial order (McCargo v. Henrick, 545 F.2d 393, 401 (4th Cir. 1976), telling counsel what he wanted in it at a pretrial conference hearing if he chose to have it completed by counsel.

Petitioner Buss was not only not accorded a just, fair, impartial hearing or determination on either his age discrimination suit on its merits or on the charge that he had not prepared a "proper" proposed pretrial conference order.

He was not accorded the right or opportunity for any hearing at all.

The respondent's counsel, at a status conference on September 22, 1980, five weeks before the scheduled October 27, 1980 pretrial conference, moved orally to dismiss, arguing inaccurately that he had not been contacted since the prior proceeding on August 11, 1980.

No legal evidence was introduced by respondent Western Airlines that petitioner Buss had failed to comply with any valid court order or local rule to the best of his ability, nor was the petitioner given any opportunity whatsoever to respond by

meeting opposing evidence, or to oppose with evidence or argument prior to the dismissal. (Gregory v. Chicago, 394 U.S. 11, 22 L.Ed.2d 134, 89 S.Ct. 946; Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624; Estate of Buchman, 123 Cal.App.2d 546; Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897); Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S.Ct. 2202 (1981); Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976); Mott v. MacMahon, 214 F.Supp. 20 (N.D.Cal. 1963); Gonzi v. Superior Court, 51 Cal.2d 586, 355 P.2d 97; Chapman v. California, 386 U.S. 18).

Argument impermissibly became evidence herein.

To judge in a contested proceeding implies the hearing of legal evidence from both sides in open court, a comparison of the merits of the evidence of each side,

a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition. These due and regular procedures are wholly absent from the Buss matter. (Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897))

Like respondent's motion to dismiss, the defense-drafted dismissal order and the appellate opinion are totally empty of a statement of facts or findings of fact for this court to use to evaluate the reasons for the dismissal in order to determine their fairness and erroneousness. (Kelly v. Everglades Drainage District, 319 U.S. 415, 87 L.Ed. 1485; Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 805 (1967))

II

THE BUSS V. WESTERN AIRLINES, INC. DECISION PLACES THE NINTH CIRCUIT IN CONFLICT WITH THE U.S. SUPREME COURT IN SOCIETE INTERNATIONALE V. ROGERS, 357 U.S. 197, AND THE THIRD FOURTH AND SEVENTH CIRCUITS WHICH HAVE HELD THAT THE DISTRICT COURT EXCEEDS ITS JURISDICTION UNDER F.R.CIV.P., RULE 16 BY PLACING THE ENTIRE BURDEN ON A PLAINTIFF TO OBTAIN STIPULATED, COMPLETE PRE-TRIAL ORDERS, CONTAINING UNREASONABLE REQUIREMENTS THAT A PLAINTIFF IS UNABLE TO SATISFY, FOR A JUDGE TO EXECUTE ON PAID OF DISMISSAL.

U.S.D.C., (C.D.Cal.) Local Rule 9(g)

providing that

> "Not later than 5:00 p.m. on the Wednesday prior to the pretrial conference, plaintiff shall serve and lodge with the clerk a proposed Pre-Trial Conference Order, approved as to form and substance by the attorneys for all the parties appearing in the case . . ."

is inherently and as construed and applied, a violation of Due Process of Law, Fifth Amendment, United States Constitution.

A trial judge exceeds his jurisdiction in attempting to exact unreasonable requirements from a plaintiff in the preparation of a pretrial order as in Local Rule 9(g). Here, petitioner Buss was required to have lodged a joint pretrial order completed by respondent before a pretrial conference had taken place that met the trial judge's unarticulated specifications, an obvious physical impossibility. Could anything have been more unreasonable?

Petitioner was also required to have obtained defense counsel's stipulation and signature on a proposed draft of the pretrial before the pretrial hearing.

During 1980, U.S. Dist. Ct. (C.D.Cal.) (Civil) Local Rule 9 did not in any way take into consideration or provide for an adjudication and remedy for culpable misconduct by the defendant in failing to cooperate to complete the pretrial documents.

Since the dismissal of the Buss matter, Local Rule 9(g) has been amended to require that all the parties cooperate and execute the pretrial proposed document on a timely basis.

Further, petitioner's proposed sanction of entry of a default against a culpable defendant for failure to cooperate has been codified in the U.S. District Court for Central District of California, Local Rule 27 (1983), and recognized as an appropriate analogous remedy for a plaintiff for a defendant's failure to respond with needed discovery. (Hritz v. Woma Corp., 732 F.2d 1178 (7th Cir., 1984.))

In the case at bar, the trial court's dismissal order did not in any way specify any culpable conduct on petitioner's part for his inability to obtain a joint statement, co-signed by the respondent's counsel. (Societe International v. Rogers, 357 U.S.

197, 212, 2 L.Ed.2d 1255, 1265, 78 S.Ct. 1087 (1958).)

This Court said in Societe Internationale v. Rogers, 357 U.S. at 209, 2 L.Ed.2d at 1265, that provisions for dismissal of a complaint must be read in light of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this court in Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841, and Hammond Packing Co. v. Arkansas, 212 U.S. 322, 53 L.Ed. 530, 23 S.Ct. 370.

Neither the trial court nor the appellate court addressed your petitioner's inability to go any further in adding anything more to the proposed pretrial order due to the respondent's failure to supply discovery and the trial judge's failure to adjudicate the disputed aspects

of the proposed pretrial order. (App. K, p. 71.) These facts cannot in any way be characterized as "willfulness, bad faith, or fault of petitioner" (Societe Internationale v. Rogers, 357 U.S. at 212, 2 L.Ed.2d at 1267) or as constitutionally sound bases for dismissal of an action without trial on the merits.

In Padovani v. Bruchhausen, 293 F.2d 546, the Second Circuit reversed the dismissal of an action when plaintiff was unable to produce a pretrial order draft that satisfied the trial court. The Second Circuit U.S. Court of Appeals said at 293 F.2d at 549:

> ". . .And where special pleading is emphasized that it remains uncertain what is demanded; here after four tries by defense counsel and the court, it is still unclear what it is thought the plaintiff must do to limit the case he has pleaded."

In the Padovani case, supra, 293 F.2d at 547, the court described the trial court's dismissal order:

> "The order is sweeping in its mandate. It is based upon specific findings that plaintiff's three successive pre-trial statements 'have failed to comply with notices and this Court's prior rulings' and that 'Plaintiff has been afforded more than ample opportunity to meet the prescribed requirements;'"

The Second Circuit found the trial judge's orders to be too indefinite and imprecise for compliance, in reversing the dismissal.

In the case at bar, petitioner was given absolutely no directions at all on how he was to redraft or change his pre-trial conference order draft to satisfy the trial judge. (App. L, p. 160)

In Identiseal Corporation of Wisconsin v. Positive Identification Systems, Inc., 560 F.2d 298, at 302 (7th Cir., 1977), the Court stated:

"We have recently decided a case in which we made clear that there are limitations on the district court's power at the pretrial conference. In J. F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir., 1976) (per curiam), we held that a district court lacks authority under Rule 16 to dismiss an action because one of the parties would not agree to a stipulation of facts. We noted that Rule 16 is noncoercive in nature, and we concluded that a dismissal based on a party's refusal to follow the trial judge's wishes expressed at the pretrial conference could only be upheld if that refusal could be characterized as a 'failure to prosecute.' Because the party that would not agree to the stipulation of facts was clearly not attempting to avoid trial, the district court's order could not stand."

In the case at bar, respondent disputed petitioner's reservation of rights to conduct damages and pattern and practice discovery, and use it at trial, as contained in the second draft of the proposed pretrial conference order.

The Third Circuit has articulated its position that unreasonable requirements made by a trial judge are in excess of his jurisdiction in Titus v. Mercedes Benz of North America, 695 F.2d 746, at 752 (3rd Cir., 1982):

> "On March 11, 1981, appropriately six weeks after the complaint was filed, the magistrate issued a six-page notice, announcing a series of elaborate, burdensome, and largely wasteful steps that the parties would have to undertake in preparation for trial. . .
>
> * * * * * *
>
> It should be noted that similar local rules have been struck down in other circuits as violative of F.R.Civ.P., Rule 16. J. F. Edwards Construction Co. v. Anderson Safeway, et al., 542 F.2d 1318 (7th Cir. 1976); Identiseal Cor. of Wisconsin v. Positive identification Systems, Inc., 560 F.2d 298 (7th Cir. 1977); McCargo v. Hendrick, 545 F.2d 393 (4th Cir. 1976).
>
> * * * * * *
>
> It is the failure of plaintiff's counsel to render full and timely compliance with the requirement, set forth in the magistrate's notice, that plaintiff's counsel must be the

primary responsibility for preparing an elaborate final pretrial order that caused the dismissal of the action. In my view, dismissal for that reason can be justified only if the requirement was reasonable. While a district court must be accorded broad discretion in managing its calendar, that principle does not shield from appellate review utterly unreasonable and counter-productive "make-work" requirements which serve no valid case-management goal.

In McCargo v. Hedrick, 545 F.2d 393, at 401 (4th Cir. 1976), the Fourth Circuit stated:

". . .Rule 16 was never meant to make lawyers try a case on paper instead of in a courtroom. In fact, it contemplates that the district judge himself will dictate the pretrial order. . ."

The reporter of the Supreme Court's Advisory Committee on the Rules of Civil Procedure has written:

"So the proper function of pre-trial is not to club the parties--or one of them--into submission. Rather the function is to see that the parties and the court are fully acquainted with the case, leaving no room

for the tactic of surprise attack or defense, and to uncover and record the points of agreement between the parties--all to the end of shortening and simplifying the eventual trial. Note the emphasis of Rule 16 upon 'the agreement made by the parties as to any of the matters considered;' there is here no basis for forcing the parties to replead or restate their legal propositions in terms more limited than the issues framed by the pleadings. . ."

III

THE COURT ORDER PROHIBITING PRESERVATION OF THE PRETRIAL PROCESS BY TAPE RECORDING OR CERTIFIED SHORTHAND REPORTER WAS PER SE, HARMFULLY, PREJUDICIALLY VIOLATIVE OF DUE PROCESS OF LAW. IT DENIED PETITIONER THE MEANINGFUL OPPORTUNITY TO INTRODUCE INTO EVIDENCE PROBATIVE, OBJECTIVE EVIDENCE TO OPPOSE THE F.R.CIV.P., RULE 41(b) DISMISSAL MOTION.

Petitioner Buss was denied the meaningful opportunity to be heard by prohibiting him from preserving and introducing into

evidence what had occurred in the pretrial process in violation of the Fifth Amendment, United States Constitution. (Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S.Ct. 2202 (1981).)

When extreme disputes occurred over the flow of the pretrial process, petitioner's counsel taped one meeting on June 18, 1980, and attempted to have a reporter take down another to preserve the truth about what had occurred and to use to prepare a proposed pretrial order. (A duplicate tape of the June 18, 1980 meeting is attached to a motion filed in the U.S. Court of Appeals for the Ninth Circuit, on June 19, 1984.)

On June 30, 1980, Judge Hatter demanded that the June 18, 1980 meeting tape be surrendered to him. He detained it from June 30, 1980 until August 11, 1980, preventing petitioner from using it to prepare

a proposed pretrial conference order. (App. G, p. 27)

On July 3, 1980 Judge Hatter further issued an order in pertinent part:

> "Tape recording or other reproduction of meetings between counsel shall not be permitted; . . ." (Doc. 327, p. 2)

The first trial Judge and the U.S. Magistrate had both issued orders that permitted preservation of all proceedings and meetings.

On August 4, 1980, Judge Hatter admitted he did not know what the source of the friction was concerning the pretrial. He further later admitted not listening to the June 18, 1980 meeting tape. (App. U, p. 318)

In Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S.Ct. 2202 (1981), this Court held that where an accused putative father was denied the right to have HLA blood testing performed in order to

establish scientifically, reliability and objectively whether he was the father of a child, such a denial of the opportunity to collect, preserve and introduce into evidence the test results is a denial of due process of law and equal access to the courts.

In In re Martin, 58 Cal.2d 509, 512-513, 24 Cal.Rptr. 833, 374 P.2d 801, the California Supreme Court held that where the authorities withheld consent and regulations prohibited a defendant from obtaining a blood alcohol test to establish whether he was intoxicated so that he could produce probative, material evidence to establish his innocence, he was denied due process of law.

In Internal Revenue Service tax audits, the taxpayer is entitled to have the audit tape recorded or taken down by a shorthand reporter in order to establish a record.

U.S.A. v. Huene (9th Cir., 1984); Mott v. McMahon, 214 F.Supp. 20, 22 (N.D.Cal. 1963); 1 Audit CCH Internal Revenue Manual, ch. 4245.

The California Supreme Court ordered that a shorthand reporter be present at either party's request when a party's physical examination was required by court order and the examination was subject to further proceedings in the case of Gonzi v. Superior Court, 51 Cal.2d 586, 589-90, 335 P.2d 97 (1959).

Your petitioner is in an analogous position to that of the petitioners in the Little, Martin and Gonzi matters. In the case at bar, Mr. Buss was denied the opportunity to preserve a record of the pretrial process that was in such heated dispute in order to present probative evidence in court, when the respondent accused him of not cooperating in the

pretrial process.

As a result of the trial Judge's order, this court is left without an objective certified record and competent evidence to review.

In Griffin v. Illinois, 351 U.S. 12, 19, 100 L.Ed. 891, 899, 76 S.Ct. 585 (1956), this Court held that an indigent is entitled to a reporter's transcript on appeal in order to be effectively heard and to have effective access to the appellate courts and effective aid of counsel.

By denying your petitioner Buss the opportunity to have the record preserved, the trial court and respondent denied petitioner the effective access to the appellate court just as the petitioner in Griffin v. Illinois was denied access.

Title 28, U.S.C., Section 753 requires that proceedings in all federal courts be taken down by tape recording or shorthand

reporter.

If the pretrial process was a "proceeding" concerning which a litigant could be sanctioned, petitioner respectfully submits that he is entitled to have it treated as a "proceeding" for the purposes of preserving his rights to a reviewable record concerning those sanctions.

Without an accurate and complete record of the pretrial process, requested by petitioner, no court has had the whole record before it to evaluate.

IV

THE FAILURE TO ENFORCE PETITIONER'S RIGHTS TO DISCOVERY OF ADMISSIBLE PATTERN AND PRACTICE EVIDENCE ON THE ISSUES OF INTENT AND ADMISSIBLE DAMAGES EVIDENCE CONSTITUTES HARMFUL, PREJUDICIAL DENIAL OF DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT, U.S. CONSTITUTION.

Your petitioner Buss persistently and repeatedly sought the enforcement of

pattern and practice and damages discovery. (See App. 10, 48, 50, 106, 179.)

He was unsuccessful in obtaining meaningful discovery despite grudging admissions that he was entitled to same. (See Reporter's Transcript of June 25, 1979 hearing before Judge Waters.)

His F.R.Civ.P., Rule 37 discovery applications for final adverse rulings against the respondent were ignored and pending for extended periods of time from mid-summer, 1979 through the spring of 1980 before being denied by Judge Hatter summarily.

In Hickman v. Taylor, 329 U.S. 495, at 515, 91 L.Ed. 451, Justice Jackson said in a concurring opinion:

> "It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. CF. Report of Commission on the Administration of Justice in New York State (1934) 41-42."

But what good is a lawsuit in which petitioner can prove liability, but is not given discovery of admissible evidence of his damages, as occurred here?

It is with the petitioner's inability to enforce discovery through the remedies provided for by F.R.Civ.P., Rule 37 due to the U.S. Magistrate referral and the lack of authority in the U.S. Magistrate, who was not able to make Article III, final adjudications, that the process broke down and the respondent was able to effectively thwart both discovery and the pretrial process. (U.S. V. Ritte, 558 F.2d 926 (9th Cir. 1977.)

V

A MAGISTRATE HAS NO JURISDICTION TO MAKE EVIDENTIARY DETERMINATIONS FOR AND CONCERNING TRIAL OR FINAL ADJUDICATIONS, BECAUSE HE IS NOT AN ARTICLE III JUDGE AND IS NOT THE UNITED STATES DISTRICT JUDGE HEARING THE TRIAL OF THE CIVIL ACTION. HIS DETERMINATIONS CONCERNING DISCOVERY MATTERS ARE ACTUALLY DETERMINATIONS OF WHAT THE ISSUES ARE IN THE CASE AND EVIDENTIARY RULINGS, PARTICULARLY ON WHAT IS RELEVANT AND PRIVILEGED, AT TRIAL, WHICH HE HAS NO JURISDICTION TO MAKE, AND CONSTITUTE A BIFURCATED TRIAL WHICH IS UNCONSTITUTIONAL. A U.S. MAGISTRATE HAS NO JURISDICTION TO ENTER FINAL DISCOVERY ORDERS UNDER F.R.CIV.P., RULE 37. FOR THESE REASONS TITLE 28 U.S.C., SECTION 636(b) AND THE ORDERS OF JUDGE WATERS, DATED JULY 5, 1978, JULY 24, 1978, AND DECEMBER 20, 1979, ARE INHERENTLY AND AS CONSTRUED AND APPLIED A VIOLATION OF DUE PROCESS OF LAW AND THE RIGHT TO A FULL AND FAIR JURY TRIAL AS GUARANTEED BY ARTICLE III AND THE FIFTH, SIXTH AND SEVENTH AMENDMENTS, U.S. CONSTITUTION. (TRO, INC. V. McMILLEN, 460 F.2d 348; NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO., 458 U.S. 550, 73 L.ED. 2D 598, 102 S.CT. 2858.

In TRO, Inc. v. McMillen, 460 F.2d 348, in vacating a district court judge's order

referring a case to a magistrate and directing the district court judge to hear and determine various matters, the United States Court of Appeals for the Seventh Circuit made the following comments, to-wit:

> ". . .Constitutional Concern
>
> From the outset of the preliminary hearings and throughout the period until the act (Title 28 U.S.C., Section 636) was passed, there was an abiding concern by interested witnesses before the committees considering the various proposed bills, and by senators and representatives that expland-ing the jurisdiction of commissioners or magistrates might violate the dual constitutional concempts (1) that Article II of the Constitution vests the judicial power of the United States in judges possessing life tenure and undiminishable salaries and (2) that due process of law encompasses the right of litigants to have "cases" and "controversies" determined by Article III judges." (Footnotes omitted.)

A magistrate is not an Article III Judge any more than a bankruptcy judge is.

(Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U. S. 550, 73 L.Ed.2d 598, 102 S.Ct. 2858 (1982)).

Pretrial discovery determinations commence the shaping of factual determinations as to the issues of what is relevant and privileged in the actual trial of the facts. The United States Supreme Court has stated in its famous and basic case of Hickman v. Taylor, 329 U.S. 495, 91 L.Ed. 451, that what is evidence at trial is discoverable. It is in making the determination as to what is evidence that trial-type decisions on relevancy and privilege are made. It is this counsel's contention that only the Article III Judge assigned to hear the case may make those determinations.

What occurs if there is a magistrate referral is a bifurcation of the trial issues on what is evidence at trial. Particularly where the plaintiff here had

objected to these magistrate referrals and had run writs vigorously objecting to them, the magistrate referrals were clearly not consented to in any way.

Also, it is respectfully submitted that the trial judges in repeatedly referring this matter to a magistrate for F.R.Civ.P., Rule 37 adjudication, and refusing to enter orders de novo on the pretrial discovery matters raising final adjudicatory issues, were clearly erroneous, failed to exercise their authority when required to do so, these failures to make de novo determinations constituted prejudicial misconduct by the involved judges, and denied the petitioner Buss the right to due process of law and hearings on the merits of his claims by an Article III Judge under Article III and the Fifth Amendment, U.S. Constitution, and the trial judges lacked jurisdiction to act as they

did in making pretrial discovery motion referrals that were non-consentual. (See U.S. v. Roddatz, 447 U.S. 667, 65 L.Ed.2d 424, 100 S.Ct. 2406 (1980); Mathews v. Weber, 423 U.S. 261, 271, 46 L.Ed.2d 483, 96 S.Ct. 549 (1976).)

This is clearly a private dispute case, in which the right to a jury trial has been Congressionally authorized.

A U.S. Magistrate has no jurisdiction when assigned non-consentually to discovery matters, to enter final adjudications under F.R.Civ.P., Rule 37. These remedies include contempt, summary judgment, findings of fact adverse to a party, entry of defaults and default judgments.

Nevertheless, petitioner was forced by this unconstitutional U.S. Magistrate referral to run an Alice in Wonderland race in which he could never advance his position in order to be prepared for trial

by the referral. It is noted that the respondent did not at any time submit itself to the jurisdiction of the U.S. Magistrate, making any proceedings before him sham. (Pacemaker Diagnostic Clinic of America v. Instromedix, 712 F.2d 1308 (9th Cir., 1983), 725 F.2d 551 (9th Cir., 1984); U.S. v. Ritte, 558 F.2d 926 (9th Cir. 1977.)

VI

PETITIONER MOVES THAT THIS MATTER BE REMANDED TO THE TRIAL COURT TO MAKE PROPER ADJUDICATIONS ON THE ISSUES PRESENTED BY PETITIONER, INCLUDING A JURY TRIAL ON THE MERITS, PURSUANT TO TITLE 28, SECTION 2106, IN LIGHT OF THE TRIAL COURT'S FAILURE TO MAKE ANY FINDINGS OF FACT IN THE DISMISSAL ORDER.

In Kelley v. Everglades Drainage District, 319 U.S. 415, at 422-423, 87 L.Ed. 1485, at 1489, this Court stated:

". . .it is not the function of this court to search the record

> and analyze the evidence in order to supply findings which the trial court failed to make. . . .We hold that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion."

Your petitioner respectfully submits that a dismissal without any articulated factual basis, harmfully, prejudicially, materially denies petitioner both substantive and procedural due process of law as guaranteed by the Fifth Amendment, U.S. Constitution. (Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967).

WHEREFORE, petitioner Robert A. Buss prays that this Honorable Court grant his petition for writ of certiorari, directed to the United States Court of Appeals for the Ninth Circuit and reverse and remand this matter, pursuant to Title 28 U.S.C.,

Section 2106, for a jury trial on the merits.

DATED: December 7, 1984.

Respectfully submitted,

JOAN CELIA LAVINE

Attorney for Petitioner-Plaintiff ROBERT A. BUSS

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APPENDIX A

F I L E D

JAN 31 1978

Clerk,U.S. DISTRICT COURT
Central District of California

(init.)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN THE MATTER OF ADDITIONAL DUTY ASSIGNMENTS TO MAGISTRATES) ORDER OF THE CHIEF JUDGE

Upon recommendation by the Magistrate Committee and approval by the Court,

IT IS HEREBY ORDERED that the following duties are assigned to the Magistrates effective February 1, 1978, for a period of 180 days or until further order of the Court.

1. Discovery Motions. On all civil cases filed on or after February 1, 1978, the Clerk's Office will assign both a District Judge and a Magistrate to each case. Assignments will be made through

the wheel. When a discovery motion is filed in any civil case, the Clerk's Office will notify the District Judge of the filing and the nature of the motion. The District Judge may, in his discretion, elect to hear and decide the motion or may order the motion referred to the Magistrate assigned to the case for the purpose of allowing the Magistrate to hear and decide the motion.

2. Special Order Transfers. On any civil case pending prior to February 1, 1978, a District Judge may assign discovery motions to Magistrates by special order. Assignment to a Magistrate will be made through the wheel.

Motions for discovery include all motions filed pursuant to Rules 26 through and including 37 of the Federal Rules of Civil Procedure.

In the course of performing the duties relating to discovery motions, the Magistrates will be required to utilize and enforce Local Rule 3(l), discourage continuances and the taking of such motions under submission.

On all discovery orders, rulings, and decisions, no motion for reconsideration by a District Judge may be filed by the parties or their counsel.

3. Civil Trials. All civil trials, both jury and non-jury, may be transferred to a Magistrate upon stipulation of the parties and order of the Court. Assignment to a Magistrate will be made through the wheel. Judgment will be entered by the Magistrates.

4. Grand Jury Returns. All grand jury returns will be received and handled by the Magistrates. The Magistrates shall establish their own duty calendar for this purpose.

DATED:(Jan. 31, 1978) /s/
Albert Lee Stephens, Jr.
Chief Judge

APPENDIX B

F I L E D
JUL 24 1978
CLERK,U.S. DISTRICT COURT
Central District of California
(init. J)
Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF(S)

ROBERT A. BUSS,

DEFENDANT(S)

WESTERN AIRLINES, INC.

CASE NUMBER
CV 77-124-LEW(Kx)

SPECIAL ORDER OF ASSIGNMENT OF MATTER TO A UNITED STATES MAGISTRATE

Pursuant to an Order of the Chief Judge the undersigned hereby orders the case returned to the Clerk for reference to a United States Magistrate for the purpose of hearing ALL FURTHER DISCOVERY MATTERS.

On all discovery order, rulings, and decisions entered by a magistrate, no motion for reconsideration by a district judge may be filed by the parties or their counsel.

5.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order forthwith by United States mail on counsel for all parties appearing in this case.

Dated: (21 July 78

/s/ Laughlin E. Waters
United States District Judge

NOTICE TO COUNSEL FROM CLERK:

This case has been referred to Magistrate JOHN R. KRONENBERG for the specific purpose of hearing and deciding the above discovery matter. Please add the magistrate's initials to the case number so that the case number reads as follows: CV77-124-LEW(Kx) and the words DISCOVERY MATTER on the caption of all documents dealing with discovery in this case.

APPENDIX C

FILED
OCT 13 1978
EMIL E. MELFI,JR.,
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. BUSS,	)No. 78-3174
Petitioner,	)D.C. # 77-0214
vs.	)Central Calif.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al.,	) ORDER
Respondents,	)
and	)
WESTERN AIRLINES, INC.,	)
Real Party in Interest.	)

Before: CHOY and SNEED, Circuit Judges.

On consideration of the petition for writ of mandamus filed herein on September 29, 1978, the Court issues the following order:

(1) That the clerk shall serve a copy of this order upon the interested district court judge and all parties to the action below. Such service shall be made by mail, and service on the parties may be effected by mailing copies to the parties' attorneys of record in the district court;

(2) Answers to the petition will be filed according to the provisions of Rule 21(b), Fed.R.App.P., and they will be filed within twenty-one (21) days of the date this order is entered;

(3) Petitioner may file, within thirty-five (35) days of the date this order is entered a reply to any answers which may be filed;

(4) Following receipt of any responses, the petition shall be passed for

consideration to the next regular motions panel;

(5) If the Court shall require oral argument, the time for such argument will be subsequently fixed and the parties notified; and

(6) Petitioner's request for the Court to act on an emergency basis is denied.

Mo Cal 10/10/78

APPENDIX D

FILED

AUG 15 1979
Clerk, U.S. District Court
Central District of California
By Deputy

JOAN CELIA LAVINE
617 South Olive St., Suite 510
Los Angeles, California 90014

(213)627-3241

Attorney for Plaintiff Robert A. Buss

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, vs. WESTERN AIRLINES, INC., a corporation, Defendant.	NO. CV-77-124-LEW (Kx)

LOCAL RULE 3(1) STIPULATION OF COUNSEL RE DISCOVERY SOUGHT IN PLAINTIFF'S MOTIONS DATED JUNE 29, 1979, JULY 10, 1979 AND JULY 20, 1979 AND FURTHER DISCOVERY SOUGHT

* * * * * *

Topic No. 3: What the policies and practices of the defendant Western Airlines, Inc., are as to the retirement of non-pilot employees, servants, corporate officers, managing agents and corporate directors of defendant Western Airlines, Inc.

PLAINTIFF'S CONTENTION NO. 4:

The plaintiff is entitled to determine the scope and extent of the defendant's practice of involuntary retirement and to determine whether the plaintiff was a victim of this form of involuntary discharge on account of age. (Title 29 U.S.C., Sections 623-631)

One form of age discrimination is involuntary retirement of any kind prior to the age of 70.

The defendant may not use age as a determining factor in cutting costs. The the plaintiff is entitled to know whether

the "retirement" of older employees was being used as a means of "cost reduction". (Title 29 CFR, Sections 860.102-860-104; Bishop v. Jelleff Associates, 308 F.Supp 579; Laugesen v. Anacondia Company, 510 F.2d 307)

The plaintiff's request on this topic was entirely precluded from this series of depositions, and yet involuntary retirement is a direct violation of Title 29 USC, Sections 623-631.

No one has ever been designated post facto or otherwise on this topic. The defendant fails to point out those areas of depositions referred to which it claims satisfy this topic, and its opposition is void for vagueness. Plaintiff moves to strike.

To the best of this counsel's recollection, Mr. Schnitzer did not indicate any particular knowledge of statistical data

showing age discrimination or lack of it. (Defendant Western's Contention No. 4)

4. With respect to Paragraph 3 of plaintiff's July 18, 1978 notice of desposition:

(a) This has already been covered in the depositions of Donald W. Vena, Dominic P. Renda and William J. Morrison

(b) Mr. Robert Schnitzer was deposed in detail on the provisions of Western's retirement plans. Mr. Schnitzer is a benefits plan administrator employed by a private consulting firm Western has retained to administer most of its pension plans.

* * * * * *

Topic No. 8: What the salaries of all corporate officers, directors, executive personnel have been during the years 1974, 1975, 1976, 1977, 1978 as well as bonuses, benefits, pension plans, insurance agreements for those with Western Airlines, Inc., in siad capacities.

PLAINTIFF'S CONTENTION NO. 9:

Plaintiff contends that he is entitled to this information to determine his damages, including his loss of salary and other benefits being given employees and executive personnel at Western and reflecting how the inflationery trends have impacted his losses. Plaintiff is entitled to determine whether his discharge was a cost-saving device due to his age and his impact on any retirement plan that Western was required to fund.

Plaintiff was supplied with a sheet, attached hereto and marked Exhibit "C", NOT

UNDER OATH AND NOT SUBJECT TO CROSS-EXAMINATION OF A DESIGNATED DEPONENT, which contained only a gross salary and per diem allowance, without such information as the entire 1978 salary or any fringe denefits which may be valued at as much as one-third of his income of Mr. Morrison, the man who replaced Mr. Buss. (U.S. v. Englis, 521 F.2d 63)

This counsel has been advised that another man, Mr. McDonald, replaced Mr. Buss between the time that Mr. Buss was terminated on October 17, 1975 and the time that Mr. Morrison took over. No information concerning his salary, benefits or advantages from employment has been provided to the plaintiff. It is reasonable to believe that if Mr. Buss had continued working, he would have been paid the same salary as those replacing him.

The plaintiff is entitled to determine whether there was or is a pattern or practice of age discrimination as a cost saving factor, impacting either salaries or fringe benefits such as pension or retirement plans. This topic has been demonstrated to be a fully valid one and has been urged by the United States Supreme Court in McDonnell Douglas v. Green, 411 US 792, 36 L.ed.2d 668. (See also Burns v. Thiokol Chem. Corp., 483 F.2d 300)

This Court has acknowledged this plaintiff's right to do discovery in this area in order to do a statistical analysis of the patterns and practices in employment at Western Airlines, particularly on the topic of age as a a consideration or criteria.

It is noted that when Mr. Morrison was asked about his income, he did not have a clear recollection of the figures and was

not prepared to respond on his own income and fringe benefits.

(Defendant Western's Contention No. 9)

9. As to Paragraph 8 of plaintiff's July 18, 1978, notice of deposition, plaintiff seeks this information for an improper purpose, to wit, the calculation of damages. Plaintiff's damages are fixed by the ADEA as unpaid wages and liquidated damages in an equal amount, if a violation is found to be willful. 29 U.S.C. § 216(b); § 626(b). Western has already furnished plaintiff with full salary information on plaintiff's replacement, William Morrison, over one year ago.

* * * * * *

EXHIBIT "C"

(Handwritten)

W. J. Morrison

Employee # 06615

Year	Gross Wages	Perdiem
1974	55618.42	269.10
75	60824.31	200.20
76	69603.96	280.15
77	78349.90	126.30
78	63810.00	91.80

Pauline Davis

Payroll Asst.

APPENDIX E

FILED
DEC 20 1979
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS,	) CV 77-124-LEW(Kx)
Plaintiff,	) ORDER RE
v.	) DISCOVERY
WESTERN AIRLINES, INC.,	)
Defendant.	)

Plaintiff filed a motion for discovery on November 17, 1979, set for hearing on December 17, 1979, and the Court continued the matter on its own motion by order filed December 14, 1979. Plaintiff's counsel having appeared on December 17, 1979, to request that the Court grant the relief sought in the motion,

IT IS HEREBY ORDERED that all discovery deadlines previously established in this lawsuit are rescinded. All further discovery matters in this case are referred to the magistrate for determination. Each future motion before the magistrate shall involve one, and only one, item of discovery sought. After he makes his determination, the magistrate shall refer each motion to this Court for review.

IT IS FURTHER ORDERED that the magistrate shall require the parties to submit, in place of the purported "Local Rule 3(1) Stipulation" filed August 15, 1979, a stipulation that complies with the requirements of Local Rule 3(1), i.e., a stipulation "specifying with particularity the issues remaining to be determined upon the hearing and the contentions of each party as to each such issue.

DATED: December (20), 1979

/s/
Laughlin E. Waters
United States District Judge

APPENDIX F

DARLING, HALL, RAE & GUTE
400 Pacific Mutual Building
523 West Sixth Street
Los Angeles, CA 90014
627-8104

Attorneys for Defendant

LODGED
JUL 1 3:53 PM '80
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA

FILED
JULY 3 1980
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, v. WESTERN AIR LINES, INC., Defendant.	No. CV 77-0124 TJH (Kx) ORDER REGARDING PRE-TRIAL PROCEEDINGS

Defendant's Motion For Sanctions Relating to Pre-trial Proceedings and Plaintiff's Ex Parte Application For Order to Show Cause came on for hearing before this Court on June 30, 1980. The Court having considered

all papers filed in reference thereto, and the affidavits of counsel, and both parties having appeared and full argued the matter.

IT IS HEREBY ORDERED:

1. Pursuant to a stipulation of the parties, the Pre-trial Conference is continued to August 11, 1980;

2. Counsel for both parties shall meet on July 21, 1980 at 10:00 a.m. at the offices of Darling, Hall, Rae & Gute to discuss the contentions of the parties, and to arrive at stipulations and agreements for the purpose of simplifying the issues to be tried, and to exchange all information required by Local Rule 9(d) and this Court's order of February 21, 1980;

3. Tape recording or other reproduction of meetings between counsel shall not be permitted.

4. Counsel for plaintiff, Ms. Joan C. Lavine, shall deliver to the Court prior to 10:00 a.m. on July 1, 1980, the original cassette tape recording of the meeting between Ms. Lavine and Mr. Giannini on June 18, 1980 at Ms. Lavine's office. If this cassette tape is not produced as provided above, Ms. Lavine is ordered to pay sanctions in the sum of Four Hundred and Fifty Dollars ($450.00) to defendant, Western Air Lines, Inc., for attorney's fees incurred as a result of counsel's failure to meet with counsel for defendant, as required by Local Rule 9(d) and this Court's previous orders.

Dated: July (3), 1908

/s/
Terry J. Hatter
United States District Judge

VERIFICATION

. . . .

PROOF OF SERVICE BY MAIL

I am imployed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action or proceeding. My business address is 523 West Sixth Street, Suite 400, Los Angeles, California 90014.

On (July 1), 19(80), I served the foregoing document described as (Order Regarding Pre-Trial Proceedings) on (the party) in this action or proceeding by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Ms. Joan C. Lavine
304 South Broadway, Suite 410
Los Angeles, California 90013

Executed on (July 1), 19(80) at Los Angeles, California.

(State) I declare under penalty of perjury that the above is true and correct.

x (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

_____
(Signature)

APPENDIX G

JOAN CELIA LAVINE
304 S. Broadway
Los Angeles, California 90013
Telephone: (213)627-3241
Attorney for Plaintiff
Robert A. Buss

RECEIVED
JUN 30 1980
CENTRAL
DISTRICT OF
CALIFORNIA
CLERK, U.S.
DISTRICT COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, vs. WESTERN AIRLINES, INC., Defendant.	CASE NO. CV-124-TJH(Kx) RECEIPT FOR TAPE OF PRETRIAL MEETING ON JUNE 18, 1980

Florence Kato, clerk to U.S. District Judge Terry J. Hatter, acknowledges receipt of a tape of pretrial meeting which took place on June 18, 1980 between counsel in the above entitled matter.

Receipt is hereby acknowledged this 30th day of June, 1980.

/s/
FLORENCE KATO, Clerk
to Judge Hatter

RETURNED AND RECEIVED THIS DATE

(Aug. 11, 1980)

/s/
Joan Celia Lavine

APPENDIX H

FILED
JUL 23 1980
RICHARD H. DEANE
CLERK, U.S.
COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. BUSS,

Petitioner,

No. 80-7364
DC# CV 77-124-TJH

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

ORDER

WESTERN AIRLINES, INC.,

Real Party in Interest.

Before: POOLE and FERGUSON, Circuit Judges

The emergency motion for reconsideration of the previous order of this court which denied a petition directing the district judge how pretrial conferences must be conducted is denied.

While reasonable persons may differ about the nature of the controversy presented by petitioner, the dispute does not reach that degree of extraordinary circumstances which causes this court to interject itself in pretrial conferences.

While reasonable persons may differ about the nature of the controversy presented by petitioner, the dispute does not reach that degree of extraordinary circumstances which causes this court to interject itself in pretrial conferences.

APPENDIX I

JOAN CELIA LAVINE
304 South Broadway, Suite 410
Los Angeles, California 90013
Telephone: (213)627-3241
Attorney for Plaintiff
Robert A. Buss

FILED
JUL 25 10:09
AM '80
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS Plaintiff, vs. WESTERN AIRLINES, INC., Defendant.	) CASE NO. CV-77-) 124-TJH(Kx)))DECLARATION OF JOAN)CELIA LAVINE IN)SUPPORT OF MOTION)FOR CONTINUANCE OF)PRETRIAL CONFER-)ENCE HEARING AND OF DATE FOR PRE- TRIAL MEMORANDUM UNDER LOCAL RULE 9(e)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

JOAN CELIA LAVINE, attorney at law, makes the following declaration under penalty of perjury:

I am and have been at all times mentioned herein duly licensed to practice law in the state of California and in the above entitled Court and have been the attorney for the plaintiff Robert A. Buss at all times mentioned herein.

On July 24, 1980, defense counsel Paul L. Giannini came to my offices for a continued Local Rule 9 meeting. The meeting was scheduled for 2:00 p.m., but Mr. Giannini arrived about 40 minutes late.

He entirely failed to display any exhibits to me at all although he had represented to my on July 22, 1980 that he had exhibits to display to me, but would not show them to me until our meeting on July 24, 1980.

He handed me a document which he characterized as a "draft" of a pretrial statement of contentions. This statement contained

contained contentions which appear to me to be false and which had never been conveyed to me before to the best of my recollection. In particular, for the first time Western Airlines has contended that Mr. Buss's department operated with ONE-THIRD FEWER EMPLOYEES under his successor, to the best of my recollection.

From what I could understand of Mr. Giannini's remarks, their present actuary expert is a Mr. Bruce Wallace, not the man whose deposition I took, a Mr. Schnitzer. To the best of my recollection no witness list was supplied to me under Local Rule 9 indicating anyone other than Mr. Schnitzer or that there was any potential that different testimony than that of Mr. Schnitzer might be given, who was held out until today as their actuary expert.

At the July 24, 1980 meeting Mr. Giannini handed me a "draft" of a witness list. I tried to confirm whether there would be any additions to alterations to it, but all he would say is that that was his list "as of today", to the best of my recollection.

Mr. Giannini claimed that the memorandum of contentions he had as a "draft" had omitted page three which would be available for me to have picked up tomorrow, July 25, 1980. However, Mr. Giannini called after the meeting and told me that nothing would be available until Monday, July 28, 1980.

We spent almost our entire time at this meeting, which went on for about alittle over an hour, with Mr. Giannini reviewing documents I displayed to him. He displayed none to me.

I believe we achieved one stipulation: that the United States District Court has jurisdiction to hear and determine the above entitled matter under the Age Discrimination in Employment Act.

Although Mr. Giannini stated to me that he would have his completed contentions available for me to pick up tomorrow morning and that I could have someone pick them up, he then said that he would be unavailable and not in the office for me to get anything.

Mr. Giannini told me on July 22, 1980 at our meeting that he would display his documents to me on July 24, 1980 when I displayed mine to him. On July 24, 1980 when he came to my offices, I had five piles of documents laid out for him to examine, but he produced none. I had shown documents I could carry July 22.

When Mr. Giannini had telephoned during the late afternoon on July 24, 1980 after our meeting that day, he told me that he was redoing his exhibit list. The import of this statement to me is that he is adding or changing his exhibits and that he has not displayed to me all of the exhibits that he intends to use at trial.

I respectfully submit that Mr. Giannini has failed to comply with Local Rule 9 to convey to me/ Local Rule 9(d) data substantially in advance of the due date of a contention of law and facts 14 days before any pretrial conference hearing and the hearing date itself what his client's position is. Mr. Giannini has never at any time said that he wanted time, except to go on a vacation to do any pretrial Local Rule 9 work this year, to the best of my recollection.

I also move that the ex parte application of the plaintiff/ be granted for an order to show cause to be issued as to why the defendant Western Airlines and its counsel should not be held in contempt which was first heard on June 30, 1980 in the above entitled matter, which papers were received herein June 27, 1980.

If called upon and sworn to testify to the foregoing statements of fact, I would be competent to so testify and certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection, except as to those matters based on information and belief and as to those matters, I believe them to be true.

WHEREFORE, the plaintiff Robert A. Buss prays for a continuance of the pretrial conference date to September 15, 1980 herein

and that an order to show cause be issued why the defendant and its counsel should not be held in contempt for failure to comply with the provisions of Local Rule 9. Plaintiff seeks reasonable attorneys' fees for being required to bring these proceedings of $1000.00.

Executed on July 24, 1980 at Los Angeles, California.

/s/

Joan Celia Lavine

JOAN CELIA LAVINE, Attorney for Plaintiff Robert A. Buss and Declarant

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above entitled cause. On (July 25, 1980) I served a true copy of (DECLARATION OF JOAN CELIA LAVINE IN SUPPORT OF MOTION FOR CONTINUANCE OF PRE-TRIAL CONFERENCE HEARING AND OF DATE FOR PRETRIAL MEMORANDUM UNDER LOCAL RULE 9(e) by personally delivering it to the person(s) indicated below in the manner as provided in F.R.Civ.P., Rule 5(b):

Darling, Hall, Rae and Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90013

Executed on (July 25, 1980) at Los Angeles, California.

I hereby certify that I am employed in the offices of a member of the Bar of this

Court at whose direction the service was made. I certify under penalty of perjury that the foregoing statements are true and correct

/s/ Linda Westbrook
(Signature)